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SERVICE DATE - MAY 20, 1997

SURFACE TRANSPORTATION BOARD[1]

DECISION

Sec. 5a Application No. 118 (Amendment No. 1), *et al.*[2]

EC-MAC MOTOR CARRIERS SERVICE ASSOCIATION, INC., *ET AL.*

Decided: May 7, 1997

The Board is seeking additional comments from interested persons on the consolidated applications of seven regional motor carrier rate bureaus for authority to expand their activities nationwide. The Board notes that, as part of its evaluation of whether the scope of the regional rate bureaus' antitrust immunity should be expanded, it will begin the process of addressing whether it should renew any or all current motor carrier rate bureau agreements prior to their statutory expiration (absent renewal) on December 31, 1998.

BACKGROUND

In March and April 1994, seven regional motor carrier rate bureaus filed separate applications seeking ICC approval of amendments to their ratesetting agreements that would enable the bureaus to expand their ratesetting territories to a nationwide basis.[3] By notice served May 12,

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[1] The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (the ICCTA), which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission (ICC) and transferred certain of its functions to the Surface Transportation Board (Board), newly created under the ICCTA. Section 204(b)(1) of the ICCTA provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by the ICCTA. This notice relates to applications that were pending with the ICC prior to January 1, 1996, and to functions that are subject to Board jurisdiction pursuant to 49 U.S.C. 13703. However, because these proceedings implicate whether and how rate bureaus will be authorized to operate in the future, the Board will consider the new law in disposing of them, and statutory references are to the current statutory provisions, unless otherwise indicated.

[2] This decision embraces six other motor carrier rate bureau applications. Traditionally, such applications have been identified as "Section 5a" applications, in reference to section 5a of the Interstate Commerce Act as it existed prior to its 1978 codification. The original "Section 5a Application" numbers, current application amendment numbers, and bureau names for the embraced applications are: Sec. 5a Application No. 34 (Amendment No. 8), *Middlewest Motor Freight Bureau, Inc.*; Sec. 5a Application No. 46 (Amendment No. 20), *Southern Motor Carriers Rate Conference, Inc.*; Sec. 5a Application No. 22 (Amendment No. 7), *Pacific Inland Tariff Bureau, Inc.*; Sec. 5a Application No. 60 (Amendment No. 10), *Rocky Mountain Motor Tariff Bureau, Inc.*; and Sec. 5a Application No. 45 (Amendment No. 13), *Niagara Frontier Tariff Bureau, Inc.* The applications of Rocky Mountain Motor Tariff Bureau, Inc., and EC-MAC Motor Carriers Service Association, Inc., had been withdrawn but were subsequently reinstated. Another application, Sec. 5a Application No. 25 (Amendment No. 8), *The New England Motor Rate Bureau, Inc.*, was withdrawn, but we are hereby reinstating it at that bureau's request and re-consolidating that application for consideration herein. Southern Motor Carriers Rate Conference withdrew its originally filed application in Sec 5a Application No. 46 (Amendment No. 19) but filed a substitute application docketed as Amendment No. 20, certain issues in which are the subject of a separate *Federal Register* notice in that docket to be published on the same date as the notice in these consolidated proceedings.

[3] The applicants were: EC-MAC Motor Carriers Service Association, Inc. (EC-MAC); Middlewest Motor Freight Bureau, Inc. (Middlewest); The New England Motor Rate Bureau, Inc.;

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1994, and published in the *Federal Register* on May 13, 1994, at 59 FR 25121-22, the ICC consolidated the applications and sought comments on them. The ICC received four comments in response to the notice.[4]

Before the ICC took action on the applications, the Trucking Industry Regulatory Reform Act of 1994 (TIRRA) was enacted. TIRRA generally eliminated motor carrier tariff filing except for collectively set rates and rates on household goods. Subsequently, the ICCTA was enacted. The ICCTA eliminated tariff filing for collectively set motor carrier rates and rates on household goods, and generally limited the Board's motor carrier rate reasonableness jurisdiction to rates that were collectively set.[5] The ICCTA also provided that, pursuant to current 49 U.S.C. 13703(d)-(e), all existing rate bureau agreements will expire on December 31, 1998, unless the Board renews them on request of the parties to the agreements.

DISCUSSION

As noted, significant legislative developments have taken place since the applications for territorial expansion were filed. We cannot responsibly address the territorial expansion issue without first addressing fundamental questions concerning the appropriate role for rate bureaus in the trucking industry, and the need for antitrust immunity, given today's regulatory environment.

Accordingly, we request views on whether, in light of the legislative developments noted above and the current economic and regulatory climate that exists today, we should renew the rate bureaus' antitrust immunity before it expires at the end of 1998. In this regard, we seek information on what functions the rate bureaus now perform; which of their functions require antitrust immunity and why; and why it is in the public interest that they be immunized from the antitrust laws.

A. *Collective Ratesetting.* The most significant rate bureau activity, at least insofar as antitrust immunity is concerned, is collective ratesetting. It appears to us that there are basically three ways of viewing collective ratesetting in the trucking industry today. Collective ratesetting could be considered vitally important given the demise of public pricing through tariff filing pursuant to the recent statutory changes, which is how SMC describes it in its revised application.[6] Collective ratesetting could be considered to be contrary to the public interest, based on the view that public pricing -- even public pricing of only baseline information -- stifles rather than enhances

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[3](...continued)
Niagara Frontier Tariff Bureau, Inc. (Niagara); Pacific Inland Tariff Bureau, Inc. (Pacific Inland); Rocky Mountain Motor Tariff Bureau, Inc. (Rocky Mountain); and the Southern Motor Carriers Rate Conference, Inc. (SMC).

[4] Supporting comments were filed by the Spangler Company and Reliance Electric Company. Opposing comments were filed by the U.S. Department of Justice (DOJ) and the National Industrial Transportation League (NITL). Replies to the opposition of DOJ and NITL were filed by five of the bureaus: SMC (two pleadings), Rocky Mountain, Middlewest, Pacific Inland, and EC-MAC.

[5] The ICCTA also gave the Board general rate reasonableness jurisdiction as to rates in the household goods industry and as to rates by or with a motor carrier in the noncontiguous domestic trade.

[6] SMC suggests that public pricing -- that is, a pricing system in which carrier pricing information is known to members of the public -- is procompetitive. Its view is that, given the demise of the tariff filing system under the recent Congressional enactments, continued immunity is necessary so that the industry can maintain through the class rate publications a series of widely known industry-wide baseline rates that individual carriers will then use as a basis for their specific (non-public) pricing decisions.

competition. Finally, collective ratesetting could be considered essentially benign, which is how the ICC viewed it in a decision in 1991.[7]

We seek comment on how we should view collective ratesetting today,[8] and on whether antitrust immunity for collective ratesetting ought to be continued.

B. *Other Rate Bureau Activities*. As noted above, we also seek information on what activities rate bureaus perform other than collective ratesetting, and why those activities require antitrust immunity. Two such functions that the bureaus cite as requiring immunity are (1) the setting of joint rate divisions and (2) the publication and dissemination of rates.

EC-MAC, for example, asserts that joint line pricing requires immunity because routing is often via specifically named individual connectors, and an originating carrier needs to have a variety of connecting carriers; regardless of which connector it uses, EC-MAC says, the originating carrier must charge the same joint rate. However, even if an originating carrier wants its joint rates to be the same with all of its connecting carriers, we do not understand why it cannot negotiate identical joint rates with each of its connectors independently. Notwithstanding the fact that each motor carrier has a multitude of potential business partners, it does not appear to us that antitrust immunity is necessary or appropriate for the setting of rates between any two business partners.

SMC, in its more recent filings, asserts that it needs immunity to facilitate the publication of "CZAR-Lite," a publication presenting rates of numerous carriers in a single computer or paper document. Yet, in a pleading filed on February 4, 1997, at 8, SMC concedes "that antitrust immunity is not needed for the simple compilation of a nationwide pricing system predicated on the class rates established by [motor carriers]."[9] It does not appear to us that antitrust immunity is necessary or appropriate for the publication and dissemination of rates, in either paper or electronic form.

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[7] *Investigation of Motor Car. Collective Practices*, 7 I.C.C.2d 388, 407-08 (1991). There, the ICC determined that a close review of class rate levels appeared to be unnecessary. The ICC surmised that the rise in class rate levels effected through general rate increases and "coincident pricing" by individual carriers during 1991 and the immediately preceding years may have been benign because collectively set rate increases were rarely charged in the competitive marketplace.

[8] In addressing this basic issue, commenters may wish to discuss the reports issued by the ICC and the Department of Transportation, in response to TIRRA, recommending the repeal of antitrust immunity for collective ratesetting. In particular, commenters should discuss: (1) whether the limited use of general rate changes in recent years argues in favor of or against continued ratesetting immunity; (2) why class rates are set at particular levels; (3) how many shippers actually pay class rates, and why any shipper would pay collectively set rates in today's economic and regulatory environment; and (4) assuming that at least some shippers pay class rates, how the Board should ensure that collectively set rates are reasonable.

[9] SMC asserts that it cannot publish paper rate sheets beyond its ratesetting territory without risking violation of the antitrust laws. In this regard, in a letter dated March 27, 1997, counsel for EC-MAC notes that Middlewest, which has limited territorial authority, has indeed issued a paper publication showing rate levels on a nationwide basis, notwithstanding the fact that a SMC tariff of similar import was rejected by the ICC in 1995. We do not believe that Middlewest's publication violates any of the laws that we administer, or that it is inconsistent with the ICC's action in rejecting the SMC tariff. The ICC rejected the SMC tariff on the ground that the SMC tariff was filed with the agency even though the rates that it contained were rates that, under TIRRA, were not subject to the rate publication requirement. *See Tariffs ICC SMC 102 and ICC SCM 502*, No. 41537 (ICC served Feb. 15, 1995). As a general proposition, we do not believe that the publication by a rate bureau (or any other party) of information about rates that have been lawfully set by any motor carrier or rate bureau poses any antitrust or other regulatory concerns. Nevertheless, we seek comment on this issue.

We seek comment on whether antitrust immunity is necessary for any rate bureau activities other than collective ratesetting (and other than collective action concerning classification, which is not at issue here).

C. *Territorial Expansion*. Assuming that antitrust immunity is continued for collective ratesetting and other rate bureau activities, we seek comment on whether the territorial scope of any or all of the bureaus should be expanded. As is the case with collective ratesetting itself, there are a variety of ways in which the requests to expand ratesetting territories can be viewed. The rate bureaus have argued that nationwide ratesetting authority will permit the advancement of a unified class rate structure, which will in turn enhance efficiency by permitting the development of computer-compatible rate designs. DOJ has argued that expansion of rate bureau territories may eliminate bureau competition and may ultimately attract large carriers back into the rate bureaus. NITL has argued that expansion of rate bureaus may produce inefficiencies and higher rates. The rate bureaus have challenged the positions of DOJ and NITL. We will accept further argument on this issue, particularly in light of the legislative changes that have taken place since the comments were first filed.

SMC argues that its request for territorial expansion should be considered separately from those of the other bureaus because SMC publishes its CZAR-Lite motor carrier pricing program that it provides to shippers. SMC submits numerous testimonials from shippers attesting to the utility of the CZAR-Lite program. Yet, although we seek comment on this matter, as we have just noted, it does not appear to us that antitrust immunity is needed to perform information-providing functions such as those associated with CZAR-Lite.[10] However, SMC's request for territorial expansion, like those of the other bureaus, does clearly implicate the basic question of the appropriate role of antitrust immunity in the motor carrier industry. Therefore, SMC's request for territorial expansion is not unique, and we see no basis for handling SMC's request separately from the others. SMC's request for separate consideration of its request for territorial expansion is denied.

In its separate application filed January 23, 1997, SMC seeks to make other, unrelated modifications to its agreement. All of these other changes are minor, except for a proposal to accord shippers and other noncarriers some form of bureau membership. The minor changes are the subject of a separate *Federal Register* notice in Section 5a Application No. 46 (Amendment No. 20). However, SMC's proposal to accord shippers and other noncarriers some form of bureau membership will be severed from Section 5a Application No. 46 (Amendment No. 20) and considered in the instant proceeding because the proposal raises important issues of policy. We seek comments on this proposal.

CONCLUSION

This decision has addressed the numerous motions and responses filed by the various parties. We now ask the parties to focus on the significant issues that we have raised concerning the future of collective action in the motor carrier industry.[11] A *Federal Register* notice will be published explaining how to participate in these consolidated proceedings.

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[10] As discussed in our notice in Sec. 5a Application No. 46 (Amendment No. 20), all the applications for territorial expansion share common legal issues, even if the facts and commenting parties differ between applications. Moreover, consolidation would not prevent us from differentiating among the applications on their merits, to the extent that differentiation is truly required. We are willing and able to determine whether the record supports the territorial expansion of some bureaus but not others and, if necessary, to reach different results for different applications. Consolidation would also ensure that we decide all of the requests for territorial expansion at the same time, which will avoid the competitive disadvantage that would result if applications were approved at different times. Finally, consolidation is administratively more efficient for the Board.

[11] Our actions here have mooted Niagara's request that we (1) defer consideration of the territorial extension requests pending our consideration of renewal of immunity, (2) permit further comments, and (3) give bureaus other than SMC an opportunity to make further changes to their agreements.

It is ordered:

1. The record is reopened for the receipt of additional comments, as discussed in this decision.

2. Notice will be published in the *Federal Register* on May 20, 1997.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary